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CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 551.

ALLAN D. EMIL, as Trustee in Bankruptcy of John M. Russell, Inc.,

Appellant,

vs.

HARRY HANLEY, Receiver,

Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

APPELLANT'S BRIEF.

DAVID HAAR,
Attorney for Appellant.

THE COURT PRESS, N. Y. C.

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APPELLANT'S BRIEF.

Statement.

This appeal brings up for review a decision of the Circuit Court of Appeals for the Second Circuit (130 F. (2d) 369), and the order entered thereon (R. 31). That decision (by a divided Court) affirmed an order of the District Court for the Eastern District of New York (R. 15), which denied the appellant's petition to compel Mr. Hanley, the respondent, to account in the Bankruptcy Court for all moneys received by him as Receiver of the bankrupt's real estate. The appellant's application for the order was based on the newly created obligations of a non-bankruptcy receiver, found in Section 2a(21) and 69d of the Bankruptcy Act, as amended in September 1938 (11 U. S. C. A., Sec. 11a(21) and Sec. 109d). The moneys to be accounted for were the proceeds of rent collections made by the respondent after the filing of the petition in bankruptcy against John M. Russell, Inc., the bankrupt and owner of the property.

The majority of the Court, in an opinion by Circuit Judge Learned Hand, held the new sections inapplicable

to mortgage foreclosure receiverships (R. 17). Judge Clark, dissenting, held that under the express provisions of these sections, as well as by virtue of the "policy and purpose" of the Bankruptcy Act, the respondent, as receiver, was subject to the supervision of the Bankruptcy Act (R. 22).

Jurisdiction.

This Court's jurisdiction to entertain this appeal is based on an order entered herein on January 4, 1943, granting the appellant's petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit (R. 32).

Statement of the Case.

On August 31, 1940, John M. Russell, Inc. was petitioned into involuntary bankruptcy in the Eastern District of New York (R. 4). When the petition was filed, the bankrupt was the owner of an apartment house, completed about two or three months before that date, and which apartment house was located in Great Neck, Long Island (R. 2).

On the day when the petition was filed, there was pending a suit in foreclosure against the bankrupt on behalf of a third mortgagee who held a mortgage of $16,000 on the property, which was then past due (R. 3). That foreclosure suit was commenced on or about August 13, 1940 (R. 6). On August 17th, 1940, a Judge of the Supreme Court of the State of New York made an order appointing the respondent herein, Harry Hanley, "as receiver of the rents and profits" of the apartment house, pending foreclosure (R. 6).

A year later, to-wit, on August 14, 1941, the judgment in foreclosure entered on June 13, 1941, was "paid and

satisfied" (R. 7). The sale under the judgment of foreclosure was abandoned (R. 3).

A motion was made by the respondent, Mr. Hanley, as receiver, to settle his accounts in the State Court (R. 3). The attention of Mr. Hanley's attorney was called to the provisions of the Bankruptcy Act requiring the Receiver to account in the Bankruptcy Court, and requesting the receiver to file such an accounting with the Referee in charge of the proceedings (R. 3). In spite of such request, the receiver proceeded in the State Court with his accounting (R. 4).

The attention of the Supreme Court was called to the fact that the then owner of the property was in control of the judgment, and that in all likelihood he would do nothing to bring on a sale of the property pursuant to the judgment (R. 4).

The receiver's accounting of his receipts and disbursements as presented in the Supreme Court, shows that altho he was appointed on August 17, 1940, he did not collect any rents from the property until after September 1st, 1940. That is just one day after the petition in bankruptcy was filed (R. 4).

Upon the payment and satisfaction of the judgment of the mortgagee, the action was terminated (R. 7). However, the Receiver in the action, Mr. Hanley, still had to file his accounting (R. 7).

During Mr. Hanley's receivership, he collected rents aggregating $30,533.05, out of which he disbursed $25,668.28, leaving a balance of $4864.99 (R. 7). This balance is subject to his claim for commissions in the sum of $1526.65 and the claim of his counsel for services in the sum of $1000 (R. 7).

Although the motion was argued on August 22d, 1941, it had not yet been decided in January of 1942. In that month, the Court before which the motion had been

argued, requested counsel to submit affidavits as to what occurred in the State Court accounting proceedings.

Thereupon an affidavit was submitted by Mr. Haar, appellant's attorney, verified on January 6, 1942, in which he respectfully protested against the receipt of any further affidavits (R. 9). However, he did state the facts with regard to the accounting. He repeated the important fact that the rents collected by Mr. Hanley as receiver were collected beginning with September 1st, 1940, "which is a date subsequent to the date of the filing of the petition against the bankrupt" (R. 9).

It also appears that the appellant's attorney protested in the State Court against proceeding there with respect to the accounting, and insisted that the matter should be heard in the Bankruptcy Court "because the receiver was accounting for property and moneys belonging to the Bankruptcy Court" (R. 9).

Mr. Haar pointed out items in detail which indicated quite clearly that the accounting was not correct, and that the trustee was not only entitled to an accounting under the law, but that he was entitled to a surcharge against Mr. Hanley as receiver, for considerable sums of money disbursed by him unlawfully, and rents not collected by him in accordance with his duties (R. 10).

The District Judge denied the motion. In his opinion (R. 14), he expresses a doubt as to whether Section 69d of the Bankruptcy Act affects a receiver appointed in a state Court "for the sole purpose of collecting rents from a specific parcel of land owned by the Bankrupt" (R. 15).

He also stated that, since the Supreme Court had appointed the receiver before the bankruptcy, it had prior jurisdiction in the matter irrespective of the new sections of the Bankruptcy Act which required receivers.

who handled moneys or property belonging to the estate *after* bankruptcy, to account to the Bankruptcy Court for the disposition of their trust (R. 15).

Assignments of Errors.

The two errors which appellant urges here are:

1. The ruling of the majority of the Circuit Court of Appeals that sections 2a(21) and 69(d) of the Bankruptcy Act (11 U. S. C. A. Sec. 11a(21), 109d) cast no obligation upon Mr. Hanley, as receiver in a mortgage foreclosure suit, to account in the Bankruptcy Court for moneys received and disbursed by him after August 31, 1940, when the petition in bankruptcy was filed.

2. The ruling that Mr. Hanley, as such Receiver, was not obligated to account in the Bankruptcy Court for these receipts and disbursements, irrespective of Statute, since these moneys came into his possession after bankruptcy, and were the proceeds of property to which the trustee had title as of August 31, 1940.

Portions of the Bankruptcy Act Applicable to This Appeal.

The applicable statutes are new. They were included as innovations in the Chandler Act, which brought about many radical changes in bankruptcy administration. The following are the two sections upon which the appellant based his right to the order which has been denied.

Sec. 2a, subd. 21 of the Bankruptcy Act (U. S. C. A., Title 11, Ch. 2, Sec. 11) speaks of the jurisdiction of

courts of Bankruptcy. Among other enumerated powers, they are empowered to

> "Require receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act; * * *, and in all such cases to account to the court for the disposition by them of the property of such bankrupt or debtor: Provided, however, that such delivery and accounting shall not be required, except in proceedings under chapters X and XII of this Act, if the receiver or trustee was appointed, the assignment was made, or the agent was authorized more than four months prior to the date of bankruptcy. Upon such accounting, the court shall re-examine and determine the propriety and reasonableness of all disbursements made out of such property by such receiver, trustee, assignee, or agent, either to himself or to others, for services and expenses under such receivership, trusteeship, assignment, or agency, and shall, unless such disbursements have been approved, upon notice to creditors and other parties in interest, by a court of competent jurisdiction prior to the proceeding under this Act, surcharge such receiver, trustee, assignee, or agent the amount of any disbursement determined by the court to have been improper or excessive."

Closely related to this exercise of power is the provision added to Section 69, known as Section 69d (11 U. S. C. A. Sec. 109d):

> "Upon the filing of a petition under this Act, a receiver or trustee, not appointed under this Act,

of any of the property of a bankrupt shall be accountable to the bankruptcy court, in which the proceeding under this Act is pending, for any action taken by him subsequent to the filing of such bankruptcy petition, and shall file in such bankruptcy court a sworn schedule setting forth a summary of the property in his charge and of the liabilities of the estate, both as of the time of and since his appointment, and a sworn statement of his administration of the estate. Such receiver or trustee, with knowledge of the filing of such bankruptcy proceeding, shall not make any disbursements or take any action in the administration of such property without first obtaining authorization therefor from the bankruptcy court."

The last sentence of Section 70 (11 U. S. C. A. Sec. 110) is also new and important:

"* * * The title of the trustee shall not be affected by the prior possession of a Receiver or other officer of any Court."

Argument.

In presenting this argument on the part of the appellant, we respectfully call the Court's attention to the following important facts about which there can be no dispute:

1. John M. Russell, Inc., the bankrupt, was petitioned into bankruptcy on August 31, 1940.

2. On that day, the respondent, Mr. Hanley, was acting as a receiver in a mortgage foreclosure suit, having been appointed in the State Court on August 17, 1940.

3. His duties were to collect the "rents and profits" of the apartment house owned by the bankrupt (R. 6).

4. The only "rents and profits" collected by Mr. Hanley, were those which accrued after September 1, 1940, one day after the petition was filed (R. 4).

5. The total collected by the Receiver was $30,533.05. The total expended was $25,668.28, leaving a balance in his hands of $4864.77 (R. 7).

6. The mortgagee, on whose behalf the foreclosure suit was brought, entered a judgment in the action, which judgment was "paid and satisfied" (R. 7) on August 13, 1941.

7. The Receiver, Mr. Hanley, was still required to account for his receipts and disbursements, after this payment of the judgment (R. 7).

The controversy below centered around the question as to whether the Respondent was required to account in the Bankruptcy Court under the amendment of the Chandler Act relating to non-bankruptcy Receivers, or whether his accounting in the State Court was sufficient, in spite of the fact that every dollar of receipts and disbursements was received and disbursed after bankruptcy.

POINT I.

A receiver is a custodian of the *res* which is the subject of litigation. As such he holds possession for the owner.

Union Bank of Chicago v. *Kansas City Bank*, 136 U. S. 223, 236;

Thompson v. *Phenix Insurance Co.*, 136 U. S. 289, 297;

Keeney v. *Home Insurance Co.*, 71 N. Y. at 401; *Dow* v. *Nealis*, 47 Misc. (N. Y.) 153.

It seems to us that the majority opinion of the Circuit Court stressed too much the distinction between a receiver in a foreclosure suit, and a receiver in a state insolvency suit (R. 19). We believe that a study of the authorities, and particularly a consideration of the purpose of the amendments under discussion, will prove the distinction unnecessary, in view of the facts in the case.

In the first place, we think it is altogether too broad a statement to make, as is made in the majority opinion, that "all the rents were sequestered for the benefit of the third mortgagee" (R. 18) upon the appointment of a receiver. The case of *Sullivan* v. *Rosson*, 223 N. Y. 217, cited as the law of New York for that proposition, does not, it seems to us, go quite that far.

Indeed, the Court cited *Freedman Savings & Trust Company* v. *Shepherd*, 127 U. S. 492, for the proposition that if the income of the property is pledged as security for the debt, the mortgagor "would have been entitled to the income until at least possession was demanded under the deed; or until his possession was disturbed by a sale under the deed of trust, or in advance of the sale by having a receiver appointed for the benefit of the mortgagee" (Cited in *Sullivan* v. *Rosson*, 223 N. Y. 215, at 225.

In our case the respondent, as receiver, was collecting the rents of the mortgaged property, but it turned out that what he collected was not needed to pay the mortgage debt. He was therefore holding the proceeds of his collections for the owner, and the owner in this case was the appellant, as trustee in bankruptcy of John M. Russell, Inc., bankrupt.

The general rule of law is that a receiver, whether in foreclosure, or in proceedings supplementary to execution, or in a partnership dissolution—or even in an equity suit, is appointed by the Court to act as custodian of the *res*.

> "A receiver derives his authority from the act of the Court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the Court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession, in the property."
>
> *Union Bank of Chicago* vs. *Kansas City Bank*: 136 U. S. 223, at 236.

In a mortgage foreclosure suit a receiver is considered to be the agent of the owner, and not of the mortgagee. This certainly would be so at least until judgment of foreclosure and sale.

> "It has been held that as to the mortgagor the Receiver is his agent for all purposes, and that such Receiver is not restricted to matters between the mortgagor and mortgagee."
>
> 42 *Corpus Juris*; Title: "Mortgages," Sec. 1705 citing *Re Hale*, 79 L. T. Rep. (N. S.) 468.

If we are to be guided by the law of New York as to the effect of a receivership (R. 18), we submit the following authority to support our view on the subject:

> "A receiver *pendente lite* is a person appointed to take charge of the fund or property to which the receivership extends while the case remains undecided.

> The title to the property is not changed by the appointment. The Receiver acquires no title, but only the right of possession as the officer of the Court. The title remains in those in whom it was vested when the appointment was made."
>
> *Keeney* vs. *Home Insurance Co.*, 71 N. Y. at 401.

In view of these authorities we believe that Mr. Hanley, as receiver, being the agent of the owner (John M. Russell, Inc.) became the agent of the new owner (Allan D. Emil, the trustee) upon his appointment. It was he who had title to the property as of August 31, 1940. That title was not "affected by the prior possession" of Mr. Hanley as receiver (Bankruptcy Act, Sec. 70, last sentence).

That being so, moneys collected by Mr. Hanley, after August 31, 1940, were collected and held by him as "agent" for Mr. Emil the trustee. The State Supreme Court had no jurisdiction over Mr. Emil. But the Bankruptcy Court did have jurisdiction not only over its own trustee, but also of Mr. Hanley, the receiver, insofar as the new statute required him to account as a non-bankruptcy receiver or "agent" for moneys received by him out of the bankrupt's property after bankruptcy.

The majority opinion ruled that the statute did not apply to a receiver in a mortgage foreclosure suit. In our next point we will discuss our contention that such a receiver does come within the category of a non-bankruptcy "receiver" or "agent", and hence the order under review was erroneous.

POINT II.

The two new sections of the Bankruptcy Act make it obligatory on all non-bankruptcy receivers and agents to account in the Bankruptcy Court for moneys received by them after bankruptcy.

The sections under discussion are new. They are the result of careful planning and discussion, both by the National Bankruptcy Conference, and the Congressional committee entrusted with drafting the amendments for Congressional action. Why were the alternative terms used: "receivers", "trustees", "assignees for the benefit of creditors", "agents"? What do they mean?

Judge Learned Hand, in the majority opinion remarked:

> "We are not sure what Congress meant by the added phrase: 'agents to take possession of or liquidate a person's property'." (R. 21).

Judge Clark, however, expressed no doubt at all about the intent of Congress in enacting the new legislation. He says:

> "I think that under the express provision of the Chandler Act, now appearing as Bankruptcy Act, Sect. 2a(2), 69d, 11 U. S. C. A. Sects. 11a(21), 109d, as well as by virtue of its policy and purpose, this receiver is subject to the provision of the bankruptcy court as to his allowances and disbursements" (R. 22).

He goes to the heart of the matter when he says, with special reference to Section 69d:

> "It speaks of a receiver 'of *any* of the property of a bankrupt'; it covers action subsequent to the filing

of a petition in bankruptcy; it does not deprive a state court of jurisdiction. All it does is effectively protect the bankruptcy court's interest in property administered in other proceedings" (R. 29, 30).

That the new sections are broad enough to include such a mortgage foreclosure receiver has already been decided in at least two reported cases since the amendments went into effect.

In the *Matter of Central Forging Co.*, 31 F. Supp. 1020 (D. C. Pa.) a receiver had been appointed in a State Court before proceedings were begun for reorganization. The question arose as to whether the receiver was required to file his accounting in the Bankruptcy Court. The Court said this:

> "The first question is whether a receiver appointed by a State Court prior to commencement of reorganization proceedings must, as to acts done subsequent to the filing date of the reorganization petition, file his account in the state court or in the federal court.
>
> Whatever the law was formerly, it is now settled by the amendatory Chandler Act of 1938 that as to acts done after the filing of the reorganization petition, the receiver must primarily account to the federal court rather than to the state court of his appointment."
>
> *Matter of Central Forging Co.*, Debtor, 31 F. Supp. 1020.

In the Seventh Circuit a similar ruling was made in the case of *In re Rosenberg*, 128 F. (2) 924 (May, 1942). It required an "agent" in possession of real estate to ac-

count in the Bankruptcy Court under section 2a(21) of the Bankruptcy Act.

In the case at bar, the mortgagee, for whose protection the receivership was inaugurated, was paid in full. He had no further interest in any accounting the receiver might render. The original owner of the property had lost it—his title passed to Mr. Emil, the appellant. Certainly the original owner had no interest in the accounting. The receiver, being a mere custodian and an agent of the title-holder, the trustee, having collected money out of the *res* of which the trustee had title, was in duty bound to account to *him*—and to no one else.

With such an analysis of the situation, we believe it must be clear that the term "receiver" in the statute, means any custodian who has possession for the owner, or for the person ultimately declared to be the owner. If that is so, then the majority opinion below interprets a "receiver" within too narrow a confine. Judge Clark's view, we believe, is more consonant with reason and the legislative intent.

In our next point we will discuss our contention, that, even without the statute, the respondent should have been required to account in the bankruptcy court—particularly since all the money he had and disbursed was received by him after bankruptcy. Or, to put it in another way, the history of the development of bankruptcy administration, as shown in the decisions of many courts, indicates clearly that the intent of Congress was to make statutory a rule of law, which, up to 1938, had been followed merely because it was case-law.

POINT III.

A review of the authorities justifies the inclusion within the statute of all kinds of receivers required to account in the Bankruptcy Court for moneys received by them after bankruptcy.

With due respect to the majority opinion in this case, it is our belief that too much stress has been laid upon distinctions between one kind of receiver and another. No such distinction exists, insofar as the function of the receiver is concerned. This is especially true in bankruptcy cases. In administering bankruptcy assets we are not so much concerned with what a person is, but *what he has and to whom it belongs.* This is true because bankruptcy largely concerns itself with a *res*, and not so much with persons.

As Judge Clark said in his dissenting opinion "the whole purpose of bankruptcy is orderly equitable distribution of a debtor's property" (R. 28). That certainly is one important purpose, the other being the discharge of the bankrupt from his debts.

This Court has held repeatedly that the bankruptcy court's jurisdiction over a bankrupt's property is paramount (*Taylor* v. *Sternberg*, 293 U. S. 470). It is so far exclusive for administration purposes that the bankruptcy court is powerless to surrender its control in that regard (*U. S. Fidelity & Guaranty Co.* v. *Bray*, 225 U. S. 205; *Isaacs* v. *Hobbs*, 238 U. S. 734).

With that principle in mind, may we respectfully call the Court's attention to the outstanding fact in this case, to wit, that what the respondent was called upon to account for here, was a sum of over $30,000 collected by him out of property unquestionably belonging to the Trustee in bankruptcy, as a matter of law. The apart-

ment house, whose tenants were paying rent to the receiver, was property belonging to the estate. That being so, the bankruptcy court's jurisdiction to compel an accounting for the receipt and disbursement of this $30,000 was paramount, no matter what kind of a receiver you call Mr. Hanley.

Although the statute we are discussing became effective in September 1938, the Seventh Circuit took occasion to compel an accounting as against a mortgage foreclosure receiver within a year before September 1938. We refer to the case of *Matter of Park Beach Hotel Bldg Corp.* (7th Cir.), 96 F. (2d) 886.

In that case, too, there was a foreclosure of a mortgage on an apartment house owned by the debtor corporation. As in our case, a receiver had been appointed to collect the rents pending foreclosure. The action to foreclose was still pending, when the owner of the property filed a petition for reorganization under the Bankruptcy Act.

Upon the filing of this petition, the foreclosure receiver surrendered possession of the property to the trustee. However, the receiver filed his report and accounting in the State Court, which had appointed him. That court approved the accounts, and awarded him an allowance for additional services. It also ordered compensation to his attorney out of the fund.

In the Bankruptcy Court, a protest was lodged by the trustee against the account, and demand was made that the receiver return to the estate the moneys which he had paid to himself and to his attorney.

The receiver contended (as the receiver did in this case) that the Bankruptcy Court was without jurisdiction to undo what the State Court had already done with respect to the allowance of compensation to him and to his attorney.

The Seventh Circuit Court overruled the contention in the following language:

"Upon adjudication, all property of the bankrupt vests in the trustee as of the date of the filing of the petition. The bankruptcy jurisdiction and the Court's possession and control of the estate in pursuance of the same, are paramount and exclusive and cannot be affected by proceedings in other courts, whether state or federal. *Taylor* v. *Sternberg*, 293 U. S. 470, 27 A. B. R. (N. S.) 1, 55 S. Ct. 260, 79 L. Ed. 599; *Gross* v. *Irving Trust Company*, 289 U. S. 342, 22 A. B. R. 1215. It follows that a receiver of the bankrupt's property in a prior pending proceeding is subject to this paramount authority, for the result of bankruptcy is binding upon both the court appointing the receiver and the receiver as custodian of that court. With the filing of the petition for reorganization under the bankruptcy law, and its approval, the power of the state court ceased and the order fixing compensation of the receiver and his counsel entered thereafter was a nullity. *Taylor* v. *Sternberg*, *supra*.

From the moment the jurisdiction of the federal court attached, the estate in its entirety was held by the receiver as a mere repository for the bankruptcy court, and, therefore, not adversely. The receiver, having erroneously deducted compensation after the attachment of such jurisdiction, was in no sense an adverse claimant. His claim was colorable only and subject to the summary power of the bankruptcy court, which had the power to require him to file an account, the correctness of which is of necessity subject to the summary jurisdiction of the bankruptcy court. *Taylor* v. *Sternberg*, *supra*."

Matter of Park Beach Hotel Bldg. Corp., 96 F. (2d) 886 (7th Cir.).

That case was decidedly weaker in its facts than ours. There, all the money had been collected out of the debtor's property by the receiver *before* bankruptcy. In our case all the money was collected out of the bankrupt's property *after* bankruptcy. In both cases, however, the accounting was filed in the State Court after bankruptcy. Also, in both cases, it was the State Court that passed on the accounts of the receiver and gave compensation to him and his attorney.

There the similarity stops. In the Seventh Circuit, the Court held the action of the State Court in fixing allowances *after* the Bankruptcy Court acquired jurisdiction to be a nullity. In the decision now sought to be reviewed, the Second Circuit, in a majority opinion, held on similar facts that such action by the State Court and *with respect to moneys collected after bankruptcy*, was not a nullity.

The Seventh Circuit, as we have already observed, followed this principle of interpretation after the statute was enacted in September 1938, in the case of *In re Rosenberg*, 128 F. (2d) 294. In that case an agent in possession of real estate was required to account in the bankruptcy court for moneys collected by him out of the property.

The logic of the argument followed in all of these cases, which we hope we have presented in this brief, is based upon the decision of *Taylor* v. *Sternberg*, 293 U. S. 470. There, too, the Court emphasizes that it was the *res* which was the basis for decision rather than the personality of the person holding the *res*. That opinion discussed the principles of bankruptcy administration that are now well settled. For instance:

> "Upon adjudication in bankruptcy all the property of the bankrupt vests in the trustee as of the date of

the filing of the petition. Upon such filing the jurisdiction of the bankruptcy court becomes paramount and exclusive; and therefore that court's possession and control of the estate cannot be affected by proceedings in other courts, whether state or federal. (Citing cases.) This applies while the possession is constructive as well as when it becomes actual. (Citing cases.)"

The case of *In re Diamond's Estate*, 257 F. 70 (C. C. A. 6th Cir.), has been cited so frequently, in a consideration of the particular point now at issue, that we take the liberty of quoting an applicable part of that opinion here:

"The broad question involved is whether the bankruptcy court had power, by summary order, to compel the state court receiver to turn over the money to the bankruptcy court, to await its action upon the question of compensation, fees and disbursements of that receiver. We think this question must be answered in the affirmative."

Many other cases could be cited for the exclusive and paramount jurisdiction of the bankruptcy court with respect to property of a bankrupt being held by a third party without title. (See *U. S. Fidelity & Guaranty Co. v. Bray*, 225 U. S. 205.)

Nor does the rule of comity, urged strenuously by our opponent, yield to the paramount power of the bankruptcy court, to compel an accounting with respect to moneys belonging to the bankrupt, particularly where those moneys were collected after bankruptcy. That rule of comity goes no further than to require a bankruptcy court to authorize a trustee to request the state court for leave to intervene, or to request the state court to desist from further hearings. If the state court refuses the request, that does not bar the bankruptcy court from pro-

ceeding under the statute in accordance with law. Even where the state court has taken jurisdiction, the bankruptcy court will nevertheless proceed in its own way to perform its duties under the Act.

It was so held in *Gross* v. *Irving Trust Company*, 239 U. S. 342, and, likewise, *In re Diamond's Estate*, *supra*, and a similar ruling was made in the *Matter of 188 West Randolph Street Bldg. Corp.*, 88 F. (2d) 257 (C. C. A. 7th Cir.) 1937.

All of these cases have to do with moneys collected by receivers out of the bankrupt's property *before* the filing of the petition. If such is the rule in a case of that kind, surely the need for the rule is all the greater since the amendment of 1938. The reason for that is that the moneys we are concerned with in this case were all received out of the bankrupt's property as rentals *after* the filing of the petition in bankruptcy, at which time title to the bankrupt's property was vested in Mr. Emil, the appellant.

We find here that there was a fund of at least $4,000 left after everything had been paid off, including the mortgage debt. To whom did that $4,000 belong, if it did not belong to the trustee? Why wasn't that $4,000, at least, subject to a turnover in the bankruptcy court, and an accounting had in that court for the receipts and disbursements leaving the balance claimed to be only $4,000?

Aside from these legal considerations which we have just discussed, the merits are with the appellant. We call the attention of the Court to the fact that Mr. Hanley, as receiver, got over $1,500 as his commissions, when, according to Mr. Haar's affidavit, he was considered wholly "incompetent" by the referee who heard the matter (R. 11). His attorney was awarded $1,000 for fees (R. 11).

It is quite evident, in spite of the Statute which requires notice to creditors, that the creditors' rights were not considered in making these allowances, or in passing upon the accounts. The trustee got nothing, and this in spite of the admissions by the receiver that there was some money coming to him in any event, and that Mr. Russell, an officer of the bankrupt, was permitted to stay in an apartment, the rent of which was $67.50 per month, for a period of at least six months without paying any rent at all (R. p. 10).

With all due respect to the State Court, we must express surprise at such a disposition of this matter. It may very well be that a similar disposition of other receiver's accounts in state courts, was largely instrumental in causing the National Bankruptcy Conference to add to the Statute the sections we are now concerned with, to wit, that creditors' rights are paramount in a bankruptcy case. The creditors in this case were vitally interested in this $30,000. Their rights and the receiver's obligations were to be measured by the Bankruptcy Act, not by state court rules on a receiver's accounting. That was the purpose of enacting of Section 2(a), Subdivision 21, and Section 69d of the Bankruptcy Act, constituting the amendments forming part of the Chandler Act, in September 1938.

Conclusion.

It is respectfully submitted that a proper interpretation of the sections of the Bankruptcy Act in question, required an order granting the trustee's petition to compel Mr. Hanley, the receiver, to account in the Bankruptcy Court, and to have his compensation and his attorney's fees fixed there, rather than in the State Court. Likewise, the propriety of his expenditures and failure to collect

rents, as was his duty, was also a matter for the Bankruptcy Court's consideration, and not for that of the State Court, since all of his duties were performed after the filing of the petition, and not before.

It is respectfully submitted that the order of the Circuit Court should be reversed, with a direction to reverse the order of the District Court and enter an order compelling the respondent herein to file his accounting in the Bankruptcy Court, and that the appellant should thereupon have such other relief as in the premises may seem proper.

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Attorney for Appellant.